TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~324~~ 1203

JOSEPH A. BOYDEN, CLAIMANT OF ONE HUNDRED AND FIFTY-FOUR BARRELS OF DISTILLED SPIRITS, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

FILED DECEMBER 6, 1869.

SUPREME COURT OF THE UNITED STATES.

No. 324.

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3 UNITED STATES, *ss:*

[SEAL.] The President of the United States to the judges of circuit court holden in and for the district of Massachusetts, greeting:

Because, that in the record and process, and also in the rendering of judgment in a suit before you, or some of you, entitled "278 Barrels Distilled Spirits, Joseph A. Boyden, claimant of 154 barrels, plaintiff in error, v. The United States, defendant in error," a manifest error has intervened to the great damage of the said Joseph A. Boyden, as in his complaint has been stated; and as it is just and proper that the error, if any there be, should be corrected in due manner, and that full and speedy justice should be done to the parties aforesaid in this behalf, you are hereby commanded that, if judgment thereof be given, then, under your seal, you do, distinctly and openly, send the record and process in the suit aforesaid, with all things concerning them, and this writ, so that you have the same before the Chief Justice and the associate justices of the Supreme Court of the United States on the first Monday of December next, at Washington, being the present seat of the national government, that, the record and process aforesaid being inspected, they may cause to be done thereupon what of right ought to be done.

Witness the Honorable Salmon P. Chase, esquire, Chief Justice of the said Supreme Court, at Washington aforesaid, this 20th day of October, in the year of our Lord one thousand eight hundred and sixty-nine, and of the independence of the United States the ninety-fourth.

JOHN G. STETSON, *Clerk.*

Allowed by—

NATHAN CLIFFORD,
Associate Jus. Sup. Court U. S.

4 CIRCUIT COURT OF THE UNITED STATES,
Massachusetts District, ss:

And now here the judges of the circuit court of the United States in and for the said district make return of this writ by annexing hereto and sending herewith, under the seal of the said circuit court, a true and attested copy of the record and process in the suit within mentioned, and of all proceedings therein.

In testimony whereof I, John G. Stetson, clerk of said circuit court of the United States within and for the district of Massachusetts, have hereunto set my hand and the seal of said court this twentieth day of November, A. D. 1869.

[SEAL.] JOHN G. STETSON, *Clerk.*

5 UNITED STATES OF AMERICA,
Massachusetts District, ss:

At a circuit court of the United States for the first circuit, begun and holden at Boston, within and for the district of Massachusetts, on Friday, the fifteenth day of October, in the year of our Lord one thousand eight hundred and sixty-nine, before the Honorable Nathan Clifford, associate justice, and the Honorable John Lowell, district judge.

6 TWO HUNDRED AND SEVENTY-EIGHT Barrels of Distilled Spirits—Joseph A. Boyden, claimant of one hundred and fifty-four barrels, plaintiff in error,
v.
THE UNITED STATES, DEFENDANTS IN ERROR.

Upon the complaint of Joseph A. Boyden a writ of error was issued in the words following, namely:

7 UNITED STATES, *ss:*

SEAL OF THE CIRCUIT COURT, MASSACHUSETTS. The President of the United States to the judges of the district court holden in and for the district of Massachusetts, greeting:

Because, that in the record and process, and also in the rendering of judgment in a suit before you, or some of you, entitled "The United States, by information, versus 278 Barrels of Distilled Spirits—Joseph A. Boyden, claimant of 154 [plaintiff and] barrels, John H. Harrington, under the name of Boyden and Company, claimant of the remaining 124 barrels," a manifest error has intervened to the great damage of the said Joseph A. Boyden, as in his complaint has been stated; and as it is just and proper that the error, if any there be, should be corrected in due manner, and that full and speedy justice should be done to the parties aforesaid in this behalf, you are hereby commanded that, if judgment thereof be given, then, under your seal, you do, distinctly and openly, send the record and process in the suit aforesaid, with all things concerning them, and this writ, so that you have the same before the circuit court of the United States, to be holden at Boston in said district on the fifteenth day of October next, at ten o'clock a. m., that, the record and process aforesaid being inspected, they may cause to be done thereupon what of right ought to be done.

Witness the Honorable Salmon P. Chase, esquire, Chief Justice of the Supreme Court of the U. S., at Boston aforesaid, this twelfth day of September, in the year of our Lord one thousand eight hundred and sixty-eight, and of the independence of the United States the ninety-third.

JOHN G. STETSON, *Clerk.*

Allowed by—

JOHN LOWELL, *Judge.*

8 Whereupon the following return was made, namely:

DISTRICT COURT OF THE UNITED STATES,
Massachusetts District, ss:

And now here the judge of the district court of the United States in and for said district makes return of this writ by annexing hereto and returning herewith, under the seal of the said district court, a true and attested copy of the record and process in the suit within mentioned, and of all proceedings therein.

SEAL OF THE DISTRICT COURT, MASSACHUSETTS. In testimony whereof I, S. E. Sprague, clerk of said district court, have hereunto set my hand and affixed the seal of said court this second day of October, A. D. 1868.

S. E. SPRAGUE, *Clerk.*

9 UNITED STATES OF AMERICA,
Massachusetts District, ss:

At the district court of the United States, begun and holden at Boston, within and for the district of Massachusetts, on the fourth Tuesday (being the twenty-third day) of June, in the year of our Lord one thousand eight hundred and sixty-eight, before the Honorable John Lowell, judge.

THE UNITED STATES OF AMERICA, BY INFORMATION,
vs.
TWO HUNDRED AND SEVENTY-EIGHT BARRELS Distilled Spirits.

This information was filed in court on the 15th day of May, A. D. 1867, and is as follows, viz:

UNITED STATES OF AMERICA, *Massachusetts District, ss:*

THE UNITED STATES, BY INFORMATION,
versus
TWO HUNDRED AND SEVENTY-EIGHT BARRELS Distilled Spirits.

To the Honorable John Lowell, judge of the district court of the United States for the district of Massachusetts:

Be it remembered that on this fourteenth day of May, in the year of our Lord one thousand eight hundred and sixty-seven, before the Honorable John Lowell, judge as aforesaid, comes, in his own proper person, George Stillman Hillard, esquire, attorney of the said United
10 States in and for said district of Massachusetts, who prosecutes for the said United States in this behalf, and in the name and behalf of the United States of America propounds and gives the said judge to understand and be informed that at a time past, to wit, on the twenty-seventh day of April, in the year aforesaid, William H. McCartney, then and now collector of the internal revenue for the third revenue district in said district of Massachusetts, did, at said Boston, in said district of Massachusetts, and on land, seize, as forfeited to the use of the said United States of America, the goods, wares, and merchandise following, that is to say:

Two hundred and seventy-eight barrels of distilled spirits, found in the store and building occupied by Boyden and Company, and numbered forty nine on India street, in said city of Boston.

For that the said goods, wares, and merchandise so seized as aforesaid are distilled spirits, and were manufactured within the United States of America since the first day of January, in the year of our Lord one thousand eight hundred and sixty-five, on which, on being manufactured as aforesaid, a tax now is and, at all times since said first day of January, in the year of our Lord eighteen hundred and sixty-five, has been imposed by the provisions of the laws of the United States of America, to wit, of the laws relating to internal revenue; and said distilled spirits were then, to wit, on said twenty-seventh day of April, found elsewhere than in a bonded warehouse, to wit, in said store and building then occupied by said Boyden and Company, and numbered forty-nine on said India street, which said store and building was not then a

bonded warehouse, and said distilled spirits had not then and there been removed from any bonded warehouse according to law, and the tax imposed by law as aforesaid on said spirits had not, nor had any part thereof, been then and there paid, against the form of the statutes in such case made and provided; whereby, and by force of the premises and of the statutes in such case made and provided, the said goods, wares, and merchandise seized as aforesaid are forfeited to the United States of America.

And also for that the said goods, wares, and merchandise so seized as aforesaid are distilled spirits, and were manufactured within the United States of America since the first day of January, in the year of our Lord eighteen hundred and sixty-five, on which, on being manufac-
11 tured as aforesaid, a tax now is and, at all times since said first day of January, in the year of our Lord eighteen hundred and sixty-five, has been imposed by the provisions of the laws of the United States, to wit, of the laws relating to internal revenue; and said goods, wares, and merchandise, to wit, said two hundred and seventy-eight barrels of distilled spirits, was then, to wit, on said twenty-seventh day day of April, found in the possession and custody and within the control of one John H. Harrington, in a building numbered forty-nine on India street, in said city of Boston, said Harrington then and there doing business under the style of Boyden and Company, for the purpose then and there of being sold and removed by said Harrington in fraud of the internal revenue laws, and with the design then and there of said Harrington to avoid payment of said taxes so imposed as aforesaid upon said spirits, the said taxes then and there not having been paid, against the form of the statutes in such case made and provided; whereby, and by force of the premises and of the statutes in such case made and provided, the said goods, wares, and merchandise so seized as aforesaid became forfeited to the United States of America.

And also for that the said goods, wares, and merchandise so seized as aforesaid are distilled spirits, and were manufactured within the United States of America since the first day of January, in the year of our Lord eighteen hundred and sixty-five, on which, on being manufactured as aforesaid, a tax now is and, at all times since said first day of January, in the year of our Lord eighteen hundred and sixty-five, has been imposed by the provisions of the laws of the United States, to wit, of the laws relating to internal revenue; and said goods, wares, and merchandise, to wit, said two hundred and seventy-eight barrels of distilled spirits, were then, to wit, on said twenty-seventh day of April, found in the possession and custody and within the control of one Joseph A. Boyden, in a building numbered forty-nine on India street, in said city of Boston, for the purpose then and there of being sold and removed by said Boyden in fraud of the internal revenue laws, and with the design then and there of said Boyden to avoid payment of said taxes so imposed as aforesaid upon said spirits, the said taxes then and there not having been paid, against the form of the statutes in such case made and provided; whereby, and by force of the premises and of the statutes in such case made and provided, the said goods, wares
12 and merchandise so seized as aforesaid became forfeited to the United States of America.

And also for that the said goods, wares, and merchandise so seized as aforesaid are distilled spirits, and were manufactured within the United States of America since the first day of January, in the year of our Lord eighteen hundred and sixty-five, on which, on being manufactured as aforesaid, a tax now is and, at all times since said first day

of January, in the year of our Lord eighteen hundred and sixty-five, has been imposed by the provisions of the laws of the United States, to wit, of the laws relating to internal revenue, and said goods, wares, and merchandise, to wit, said two hundred and seventy-eight barrels of distilled spirits, were then, to wit, on said twenty-seventh day of April, found in the possession and custody and within the control of some person whose name is to your informant unknown, in a building numbered forty-nine on India street, in said city of Boston, for the purpose then and there of being sold and removed, by some person whose name is to your informant unknown, in fraud of the internal revenue laws, and with the design then and there to avoid payment of said taxes so imposed as aforesaid upon said spirits, the said taxes then and there not having been paid, against the form of the statutes in such case made and provided; whereby, and by force of the premises and of the statutes in such case made and provided, the said goods, wares, and merchandise so seize as aforesaid became forfeited to the United States of America.

And also for that said goods, wares, and merchandise so seized as aforesaid are distilled spirits, and were manufactured within the United States since the first day of January, in the year of our Lord eighteen hundred and sixty-five, on which, on being manufactured as aforesaid, a tax now is and, at all times since said first day of January, in the year of our Lord eighteen hundred and sixty-five, has been imposed by the provisions of the laws of the United States of America, to wit, of the laws relating to internal revenue, which tax is a tax of two dollars upon each and every proof gallon of said spirits, and has not been paid according to law, but said tax remains wholly unpaid, and said distilled spirits so seized as aforesaid were then and there found in said store and building, numbered forty-nine on India street, which said store and building was not then and there either a bonded warehouse or a
13 distillery, but said distilled spirits had been theretofore removed to said store and building from a bonded warehouse for the purpose of being sold and consumed, and said distilled spirits did then and there amount to a large number of proof gallons, to wit, to twenty-two thousand two hundred and forty proof gallons of distilled spirits, and a tax according to law heretofore has been assessed upon the said spirits, which said tax so assessed amounts to a large sum, to wit, to the sum of forty-four thousand four hundred and eighty dollars, all which said tax is a lien upon said distilled spirits, against the form of the statutes in such case made and provided; wherefore your informant prays that the amount of the taxes legally due on account of said distilled spirits may be determined, and the said taxes be declared a lien on said distilled spirits, and the said spirits may be ordered to be sold, and the proceeds be applied in payment of said taxes so declared to be a lien, and that the court may make such further orders and decrees as to right and justice may appertain.

And the said attorney of the United States, on behalf of the said United States, saith that all and singular the premises aforesaid are true; wherefore the said attorney prays the advisement of the said judge in this behalf, and that any and all person or persons be cited in general and special to answer the premises, to the end that the said goods, wares, and merchandise so seized as aforesaid be condemned by the definitive sentence and decree of said judge, as forfeited to the use of the said United States, and that the proceeds thereof, after condemnation, be distributed in manner and form as provided in and by the statutes of the said United States, or that said goods, wares, and mer-

chandise may be ordered to be sold, and the proceeds applied to the payment of the taxes adjudged to be a lien.

G. S. HILLARD,
United States Attorney for the District of Massachusetts.

14 *Warrant and monition.*

Thereupon, on said fifteenth day of May, A. D. 1867, by order of the judge, a warrant and monition issued, commanding the marshal to give notice to all persons concerned that the foregoing information had been filed, and that trial would be had thereon at a district court to be holden at the United States court-house in Boston, in said district of Massachusetts, on Tuesday, the fourth day of June, 1867, at ten o'clock a. m.; and to give said notice by advertising the same in the Boston Daily Advertiser, one of the public newspapers printed at Boston, and by posting a copy of the same notice at the said court-house in Boston, fourteen days at least before said day of trial; and to take the said two hundred and seventy-eight barrels spirits into his custody, and to make due return of his doings.

The marshal made return thereon as follows, viz:

BOSTON, *May* 27, 1867.

UNITED STATES OF AMERICA, *Massachusetts District, ss:*

Pursuent hereunto, I have given notice to all persons concerned that the information within named has been filed, and that trial will be had thereon on the fourth day of June next, by advertising the substance of the within monition in the Boston Daily Advertiser, one of the newspapers printed at Boston, in said district, and by posting up a copy of the same notice in the United States court-house in Boston, in said district, fourteen days before the day within named for trial; and on the seventeenth day of said May I took the within-named two hundred seventy-eight (278) barrels of distilled spirits into my custody on this warrant.

GEO. L. ANDREWS,
U. S. Marshal.

15 *Stipulation for costs and expenses by J. H. Harrington.*

On the fifteenth day of June, in the year of our Lord 1867, before this court personally appeared J. H. Harrington, of Boston, in the district of Massachusetts, claimant of said spirits, for himself, and also as agent or attorney of Joseph A. Boyden, and produced for surety Jonathan Harrington, of North Chelsea.

And the said J. H. and Jonathan, submitting themselves to the jurisdiction of this court, bound themselves, their heirs, executors, and administrators, jointly and severally, in the sum of four hundred dollars unto the said United States, that the said J. H. Harrington, the claimant, should pay all costs and expenses which should be awarded against him in this suit upon the final adjudication thereof, or by any interlocutory order, whether it be in this or any appellate court.

On the fifteenth day of June, A. D. 1867, the following claim was filed in clerk's office by J. H. Harrington to one hundred and twenty-four barrels, viz:

District court of the United States, Massachusetts district.

UNITED STATES, BY INFORMATION,
vs.
TWO HUNDRED AND SEVENTY-EIGHT BARRELS
Distilled Spirits.

And now comes before said court John H. Harrington, of Boston, in said district, doing business in said Boston under the firm of Boyden & Co., and claims one hundred and twenty-four of the said two hundred and seventy-eight barrels of distilled spirits proceeded against in said information, and respectfully represents that he, said Harrington, is the true and bona-fide owner of the said one hundred and seventy-eight barrels, and that no other person is the owner thereof.

BOYDEN & CO.,
By J. H. HARRINGTON.

R. M. MORSE, Jr., *Claimant's Attorney.*

JUNE 15TH, 1866.

Sworn to before me.

S. E. SPRAGUE, *Clerk.*

16 On the fifteenth day of June, A. D. 1867, the following claim was filed in the clerk's office by J. A. Boyden to one hundred and fifty-four barrels, viz:

District court of the United States, Massachusetts district.

UNITED STATES, BY INFORMATION,
vs.
TWO HUNDRED AND SEVENTY-EIGHT BARRELS
Distilled Spirits.

And now comes before said court John H. Harrington, of Boston, in said district, and in behalf of Joseph A. Boyden, of said Boston, claims one hundred and fifty-four of the said two hundred and seventy-eight barrels of distilled spirits proceeded against in said information, and respectfully represents that he, said Boyden, is the true and bona-fide owner of the said one hundred and fifty-four barrels, and that no other person is the owner thereof.

JOS. A. BOYDEN,
By J. H. HARRINGTON.

R. M. MORSE, Jr., *Claimant s Attorney.*

JUNE 15TH, 1867.

Sworn to before me.

S. E. SPRAGUE, *Clerk.*

Stipulation for costs and expenses by Jos. A. Boyden.

On the seventeenth day of April, A. D. 1868, before this court personally appeared Joseph A. Boyden, of Boston, in the district of Massachusetts, claimant of one hundred and fifty-four barrels of said spirits, and produced for sureties Eben Boyden, of Billerica, and John H. Harrington, of Boston.

And the said Joseph A., Eben, and John H., submitting themselves

to the jurisdiction of this court, bound themselves, their heirs, executors, and administrators, jointly and severally, in the sum of two hundred dollars unto the said United States, that the said Joseph A. Boyden should pay all costs and expenses which should be awarded
17 against him in this suit upon the final adjudication thereof, or by any interlocutory order, whether it be in this or any appellate court.

This information was entered at the March term, A. D. 1867, of this court, and thence was continued from term to term to the March term, A. D. 1868, when, on the seventeenth day of April, A. D. 1868, the following agreements as to value of spirits were filed in court, viz:

THE UNITED STATES
vs.
TWO HUNDRED AND SEVENTY-EIGHT BARRELS.

It is agreed that the value of the one hundred and twenty-four barrels of spirits withdrawn by John H. Harrington is $9,054 72.

April 17, 1868.

W. A. FIELD,
Assistant United States Attorney.
R. M. MORSE, JR.,
Counsel for John H. Harrington.

It is agreed that the value of the ninety barrels of spirits withdrawn by Joseph A. Boyden is eight thousand eight hundred and thirty-one dollars.

April 17, 1868.

W. A. FIELD,
Ass't U. S. Attorney.
R. M. MORSE, JR.,
Counsel for Joseph A. Boyden.

Stipulation to the action by J. H. Harrington.

On the seventeenth day of April, A. D. 1868, before this court personally appeared John H. Harrington, of Boston, in the district of Massachusetts, claimants of one hundred and twenty-four barrels of said liquors, and produced for sureties Eben Boyden, of Billerica, Insley G. Jones, of Medford, Benjamin F. Young, of Somerville, all in said district. And the said John H., Eben, Insley G., and Benjamin F., submitting themselves to the jurisdiction of this court, bound themselves, their heirs, executors, and administrators, jointly and severally, in the
18 sum of nine thousand and fifty-four dollars and seventy-two cents unto the said United States that the said Harrington should abide by all orders and decrees, interlocutory or final, of the court, and should pay the amount of the final decree of the court, and all sums of money that he should be ordered to pay by the final decree of the court, whether it be in this or any appellate court.

Warrant to deliver one hundred and twenty-four barrels.

Thereupon, on said seventeenth day of April, A. D. 1868, by order of the judge, a warrant issued, directing the marshal to cause said one hundred and twenty-four barrels spirits to be delivered to the claimant aforesaid, stipulation having been duly given therefor, upon which the marshal made return as follows, viz:

BOSTON, *April* 21, 1868.

UNITED STATES OF AMERICA, *Massachusetts District, ss:*

Pursuant to the within precept, I have caused the within-named one hundred and twenty-four barrels distilled spirits to be delivered to the claimant within named, and have taken his receipt for the same as under.

J. B. KEYES,
Deputy Marshal.

APRIL 21, 1868.

Received from George L. Andrews, marshal in and for the district of Massachusetts, the within-named one hundred and twenty-four barrels spirits, in the same state as when seized and detained by him.

J. H. HARRINGTON.

19 *Stipulation to the action by Joseph A. Boyden.*

On the seventeenth day of April, A. D. 1868, before this court, personally appeared Joseph A. Boyden, of Boston, in the district of Massachusetts, claimant of one hundred and fifty-four barrels of said spirits, and produced for sureties Eben Boyden, of Billerica, in said district, Insley G. Jones, of Medford, in said district, and Benjamin F. Young, of Somerville, in said district.

And the said Joseph A., Eben, Insley G., and Benjamin F., submitting themselves to the jurisdiction of this court, bound themselves, their heirs, executors, and administrators, jointly and severally, in the sum of eighty-eight hundred and thirty-one dollars, unto the United States, that the said Joseph A. Boyden, the claimant, should abide by all orders and decrees, interlocutory or final, of the court, and should pay the amount of the final decree of the court, and all sums of money that he should be ordered to pay by the final decree of the court, whether it be in this or any appellate court.

Warrant to deliver ninety barrels distilled spirits.

Thereupon, on said seventeenth day of April, A. D. 1868, by order of the judge, a warrant issued directing the marshal to cause said ninety barrels distilled spirits to be delivered to the claimant aforesaid, he having duly stipulated therefor; upon which the marshal made return as follows, viz:

BOSTON, *April* 18, 1868.

UNITED STATES OF AMERICA, *Massachusetts District, ss:*

Pursuant to the within precept, I have caused the within ninety barrels spirits to be delivered to the claimant within named, and have taken his receipt for the same as under.

J. B. KEYES,
Deputy Marshal.

20 APRIL 18, 1868.

Received from George L. Andrews, marshal in and for the district of Massachusetts, the within-named ninety barrels of distilled spirits, in the same state as when seized and detained by him.

J. A. BOYDEN.

From said March term this information was continued to June term, A. D. 1868, when, on twenty-ninth day of said June, the following plea of J. H. Harrington was filed in court, viz:

District court of United States, Massachusetts district.

UNITED STATES, BY INFORMATION,
vs.
TWO HUNDRED AND SEVENTY-EIGHT BARRELS Distilled Spirits.

And now comes John H. Harrington, claimant of one hundred and twenty-four of said two hundred and seventy-eight of said barrels of distilled spirits, not confessing any of the matters and things in said information alleged, and, saving and reserving unto himself all benefit and advantage of exception that can or may be had or taken to the errors and insufficiencies in such information contained, for plea says that the said goods, wares, and merchandise in said information mentioned and described did not, nor did any part thereof, become forfeited to the United States in manner and in form as in said information is alleged; and that all the allegations in said information and in the several counts thereof contained, whereby said goods are alleged and claimed to have become forfeited to the United States, are not true.

And of this he puts himself on the country.

J. H. HARRINGTON,
By R. M. MORSE, JR., *his Att'y.*

And the United States do the like.

W. A. FIELD,
Assistant United States Attorney.

21 On the twenty-ninth day of June, A. D. 1868, the following plea of Joseph A. Boyden was filed in court, viz:

District court of United States, Massachusetts district.

UNITED STATES, BY INFORMATION,
vs.
TWO HUNDRED AND SEVENTY-EIGHT BARRELS Distilled Spirits.

And now comes Joseph A. Boyden, claimant of one hundred and fifty-four of said two hundred and seventy-eight barrels of distilled spirits, not confessing any of the matters and things in said information alleged, and, saving and reserving unto himself all benefit and advantage by exception that can or may be had or taken to the errors and insufficiencies in such information contained, for plea says that the said goods, wares, and merchandise in said information mentioned and described did not, nor did any part thereof, become forfeited to the United States in manner and in form as in said information is alleged; and that all the allegations in said information, and in the several counts thereof contained, whereby said goods are alleged and claimed to have become forfeited to the United States, are not true.

And for proof thereof puts himself on the country.

J. A. BOYDEN,
By R. M. MORSE, JR., *his Attorney.*

And the United States do the like.

W. A. FIELD,
Assistant United States Attorney.

On the first day of July, A. D. 1868, the following amendment to information was filed in court and allowed, viz:

UNITED STATES OF AMERICA, *Massachusetts District, ss:*

THE UNITED STATES, BY INFORMATION,
vs.
TWO HUNDRED AND SEVENTY-EIGHT BARRELS Distilled Spirits—Boyden & Harrington, claimants.

The United States ask leave to discontinue as to the fourth and fifth counts on said information, and that each of the first three counts
22 be amended by striking out the following words, to wit: "Since the first day of January, in the year of our Lord one thousand eight hundred and sixty-five," the first time they occur in each of said counts.

W. A. FIELD,
Assistant United States Attorney.

JUNE 30, 1868.

Issue having been joined as aforesaid, the cause, after a full hearing, was committed to a jury, sworn according to law to try the same, who, after hearing all matters and things concerning the same, return their verdict therein, and upon oath say that the goods, wares, and merchandise informed against and claimed by Harrington are forfeited to the United States in manner and form as is alleged in said information, excepting seventy-four barrels, re-inspected April 25, 1867, by Cleaves.

And the jury find that the goods, wares, and merchandise informed against and claimed by Boyden are forfeited to the United States in manner and form as is alleged in said information.

Upon the trial of the said cause, after the evidence was closed on both sides, and before the issue was submitted to the jury, the claimants filed their bill of exceptions; which was sealed and allowed by the court, and is in words and figures following, namely:

UNITED STATES OF AMERICA, *Massachusetts District, ss:*

June term, 1868.

THE UNITED STATES, BY INFORMATION,
vs.
TWO HUNDRED AND SEVENTY-EIGHT BARRELS of Distilled Spirits.

Joseph A. Boyden, claimant of one hundred and fifty-four barrels; John H. Harrington, under the name of Boyden & Co., claimant of the remaining one hundred and twenty-four barrels.

Be it remembered that, on the pleadings and issues that are a part of the record of this case, this cause came on for trial at the June term of said court in the year of our Lord eighteen hundred and sixty-eight, be-

fore the Honorable John Lowell, judge of said court, and a jury. It appeared in evidence, among other things, that in April, eighteen
23 hundred and sixty-seven, several hundred barrels of domestic distilled spirits, more in quantity than the spirits seized, were withdrawn from United States bonded warehouses in Boston, upon applications made in due form to the collector of the district within which the warehouses were situate, for transportation to Eastport, Maine, for exportation thence, and upon the acceptance of the bonds offered therefor. The bonds proved to be false and fraudulent.

The spirits were not transported or attempted to be transported to Eastport, but were removed for sale and consumption in Boston and vicinity in Massachusetts, and the taxes were not paid on these spirits.

The spirits proceeded against in this suit were seized in April, eighteen hundred and sixty-seven, in a building No. 49 on India street, Boston, in the possession of Boyden and Harrington, which building was not a bonded warehouse of the United States.

It was contended by the government that the spirits informed against were a portion of the spirits removed upon these false and fraudulent bonds, and that the claimants were parties to the conspiracy by which the false and fraudulent bonds were procured to be executed and accepted, and the spirits removed for consumption and sale without payment of the taxes due on them, and the fraud on the government accomplished; that if any of the spirits seized should be found to be spirits made up of some of the spirits so fraudulently removed, mixed with other similar spirits, that the mixing was intentionally and fraudulently done by the claimants, with knowledge of the fraud, for the purpose of destroying the identity of the spirits and defrauding the United States of the tax; that Boyden and Harrington were connected in business and associated in this fraud. There was no evidence, except as to sixteen barrels marked Medford Rum, that any of the barrels of the spirits claimed by Boyden were made up of mixed lots of spirits, or had been put in the leaches, or had changed contents since they were received into his possession. It was also contended that all these spirits were at the time of seizure found in the said building, No. 49 on India street, in the possession of said Boyden and Harrington, for the purpose of being sold and removed by said Boyden and Harrington, in fraud of the internal revenue laws, and with the design of each of them of avoiding the payment of the taxes upon the spirits.

24 It was contended by the claimants that part of the spirits in controversy were not a portion of the spirits so fraudulently withdrawn, but that some of them were different and distinct lots of spirits; that the spirits claimed by Harrington had been rectified in leaches, in which various lots of similar spirits, including possibly some of the spirits so fraudulently withdrawn, had been mixed, so that it was impossible to identify the spirits after rectification with any particular lot originally put into the leaches. The claimants also contended that they bought the spirits which were seized in open market, and without knowledge of any fraud. Harrington contended that such spirits of the lot so fraudulently withdrawn as he had bought, he bought through and by means of Boyden as his agent.

Evidence was introduced tending to prove the facts claimed both by the government and the claimants.

It was not controverted that the seizure was made before the expiration of the time allowed by the regulations of the Internal Revenue Department, and expressed in the bonds given for transportation for the completion of the transportation.

The claimants requested the court to instruct the jury, among other things, as follows:

1. That if the distilled spirits which are the subject of controversy had been deposited in a United States bonded warehouse, and had been removed therefrom upon application to the collector of the district in which they were situate, and by his authority, for rectification or transportation for exportation, they are not liable to forfeiture.

2. That if said spirits had been removed from a United States bonded warehouse, upon application to the collector of the district, and upon the furnishing of bonds which were satisfactory to and accepted by him, and upon permission thereupon granted by the collector, and were seized before the expiration of the time allowed for rectification or transportation, the spirits are not liable to forfeiture.

3. That if said spirits had been removed from a United States bonded warehouse according to the forms of law, viz, upon application made in due form to the collector for leave to withdraw, and upon bonds being given in the prescribed form, and permission thereupon given in
25 due form for their removal, and said spirits had been bought by the claimants of the party withdrawing, or his agent, without knowledge of the fact that the bonds were worthless, or that said spirits were removed from the warehouse with intent to defraud the government, they are not liable to forfeiture.

4. That if a portion of the spirits proved in this case not to have paid a tax had passed through the rectifiers in which there were other spirits, and so become mixed with them, no portion of the spirits, when rectified, would be liable to forfeiture.

The court declined to give the first and second instructions prayed for.

The court gave the third instruction prayed for, with this qualification, that if Boyden bought the spirits as agent for Harrington, and Boyden was cognizant of the fraud, Harrington would be bound by his knowledge.

The court declined to give the fourth instruction prayed for, and instructed the jury that if the rectified spirits came from vats and rectifiers in which the spirits so fraudulently withdrawn, or any portion, were mixed with other lots of similar spirits of the claimants, so that they could not be distinguished, the government were entitled to the forfeiture of a fair proportion of these spirits, although the mixture might have been innocently made, provided the jury were satisfied of such facts as would, under the instructions of the court, forfeit the spirits so fraudulently withdrawn if they had not been so mixed; and if the jury were satisfied of such facts, and also found the spirits so fraudulently withdrawn were mixed with other similar spirits of the claimants by them fraudulently, with knowledge of the fraud committed, for the purpose of destroying the identity of the spirits and defrauding the government, and were so mixed that they could not be distinguished and identified, that the entire quantity of this mixture seized was forfeited to the United States.

The court gave other instructions, to which no exception was taken.

To the above rulings, and refusals to rule, the claimants at the trial took exceptions.

And inasmuch as the matters herein set forth do not appear by record, the same have been reduced to writing, and, being found to be
26 correct, this bill of exceptions, at the request of the claimants, is allowed by the court, and signed and sealed by the judge thereof, and directed to be filed as of the seventh day of July, in the year of our Lord one thousand eight hundred and sixty-eight, before the jury left the bar.

[SEAL.] JOHN LOWELL, *Judge.*

It is agreed that the value of the lot of spirits forfeited by the verdict of the jury exceeded two thousand dollars in the case of each claimant.

W. A. FIELD,
Ass't U. S. Att'y.
R. M. MORSE, JR.,
Att'y for Claimants.

And now, on this seventh day of September, anno Domini one thousand eight hundred and sixty-eight, this cause having been committed to a jury, and the jury having found that the goods, wares, and merchandise informed against, and claimed by Boyden, are forfeited to the United States in manner and form as is alleged in said information, and that the goods, wares, and merchandise informed against, and claimed by Harrington, are forfeited to the United States in manner and form as is alleged in said information, excepting seventy-four barrels re-inspected April 25th, 1867, by Cleaves, it is hereby considered by the court and adjudged that the one hundred and fifty-four barrels of distilled spirits claimed by Joseph A. Boyden are forfeited to the United States of America in manner and form as is alleged in said information, and it is also considered by the court and adjudged that of the one hundred and twenty-four barrels of distilled spirits claimed by John H. Harrington, under the name of Boyden & Company, fifty barrels of distilled spirits are forfeited to the United States of America in manner and form as is alleged in said information, and seventy-four barrels of distilled spirits are not forfeited to the United States of America in manner and form as is alleged in said information, and are to be restored to said claimant John H. Harrington.

27 UNITED STATES OF AMERICA,
Massachusetts District, ss:

I, S. E. Sprague, clerk of the district court of the United States within and for the district of Massachusetts, hereby certify that the foregoing is a true copy of the record in the said cause.

In witness whereof I have hereunto subscribed my name and affixed the seal of the said court this second day of October, A. D. 1868.

S. E. SPRAGUE, *Clerk.*

28

29 This cause was duly entered here at the October term, A. D. 1868, when and where the parties appeared by their respective attorneys, and the cause came on to be heard, and was argued by counsel.

On the fourteenth day of November, A. D. 1868, the following petition was filed, namely:

To the honorable the justices of the circuit court of the United States for the first circuit and district of Massachussets:

Respectfully represents W. A. Field, assistant United States attorney, in behalf of the United States, that of the spirits seized in said suit, sixty-four barrels, claimed by Joseph A. Boyden, are still in the custody of the marshal, all the rest of said spirits having been delivered to said claimants, respectively, on filing stipulations for the value thereof according to law; that all of said spirits were seized April twenty-seventh,

eighteen hundred and sixty-seven, and said sixty-four barrels have
30 been stored ever since; that, as your petitioner is informed, there has already been considerable loss of spirits from leakage, evaporation, and other causes, and the cost of storage has been great, and your petitioner believes that said spirits cannot be longer kept without large and necessary expenses, and without considerable loss; and for proof thereof he refers to the affidavit of Collector McCartney hereto annexed. Wherefore your petitioner prays that said court may order said sixty-four barrels of spirits to be sold at public auction, in Boston, by the marshal of the United States for this district, and that the proceeds of said sale may be paid into the registry of this court, to abide any orders and decrees that may be made in said suit in reference to the spirits claimed by said Boyden.

W. A. FIELD,
Ass't U. S. Att'y.

Nov. 14, 1868.

31 UNITED STATES INTERNAL REVENUE,
COLLECTOR'S OFFICE, 3D DISTRICT MASSACHUSETTS,
Boston, Nov. 13th, 1868.

I, William H. McCartney, collector of internal revenue 3d dist. of Mass., on oath depose and say that the sixty-four barrels of distilled spirits by me seized, in the possession of J. A. Boyden, as forfeited to the United States for non-payment of the taxes due thereon to the United States, and now claimed by said Boyden, cannot be longer kept without great and unavoidable loss from leakage and evaporation, and expense from storage, cooperage, handling, &c. I do also depose and say that, from careful enquiry, I am informed and do verily believe that the loss from leakage, evaporation, &c., and the other expenses necessarily entailed in keeping said spirits will amount to at least fifty dollars a month; and I do also depose and say that I think said spirits ought to be sold under the order of the court.

W. H. McCARTNEY,
Collector 3d Dist. Mass.

32 NOV. 13TH, 1868.

U. S. OF AMERICA, *District of Mass.:*
Sworn to before me.

JOHN G. STETSON,
Clerk U. S. C. C.

Thereupon, on the seventeenth day of November, A. D. 1868, by order of court, a warrant issued in the words following, namely:

33 [L. S.] The President of the United States of America to the marshal of the district of Massachusetts, or either of his deputies, greeting:

Whereas, at a circuit court of the United States holden at Boston for and within said district, on the fifteenth day of October, A. D. 1868, to wit, November 16th, 1868, in a cause entitled "278 Barrels Distilled Spirits—Joseph A. Boyden, claimant of 154 barrels, and appellant, vs. The United States," sixty-four of said barrels still in custody of the marshal, on petition of the assistant attorney of the United States, were ordered to be sold at public auction: These are, therefore, to command you to sell to the highest bidder, at public auction, at Boston, within said dis-

trict, on Saturday, the fifth day of December next, at twelve o'clock noon, the said sixty-four barrels distilled spirits, first giving fifteen days' notice at least of the time and place of sale, by advertising the same in Boston Daily Advertiser, one of the newspapers printed at Boston, and by proclamation of the town-crier, in the usual form, on the day of sale; the money arising from the sale to be paid into the registry of the said court, to be disposed of as the law in this case directs.

And make due return hereof, with your doings herein.

Witness the Honorable Salmon P. Chase, at Boston, this seventeenth day of November, A. D. 1868.

JOHN G. STETSON, *Clerk.*

34 Whereon the marshal made the following return, namely:

BOSTON, *December 7th*, 1868.

UNITED STATES of AMERICA, *District of Massachusetts*:

Pursuant to this precept, I have caused 59 barrels of distilled spirits from the within-named 64 bbls. (the balance, 5 bbls., not being in my possession) to be sold by public auction and to the highest bidder, at Boston, on the day, hour, and place therein directed, having given fifteen days' previous notice of the time, place, and manner of the sale in the Boston Daily Advertiser, one of the newspapers printed in Boston, and by the town-crier, on the day of sale, and at such sale the purchasers were as under.

Warrant for sale of—

Sherman Bros., 58 bbls. of spirits		3,081 76
D. Goodnow & Co., one do do		31 62
		3,113 08
Fees, costs, & expenses:		
Travel, 12c.; proc., 60c.; crier, 1 00	1 72	
Advertising, $7 00; storage, $731 50	738 50	
Labor, $14 50; truckage, $11 70	26 20	
Insurance, $120; guaging & inspecting, $172 88	292 88	
Cooperage, $408 50; auctioner, $77 87	486 37	
Copies, $2; com's *a* 7½ & 2½ per ct., $45 16	47 16	
		1,592 83
		$1,520 25

Whereby the net sales amounted to fifteen hundred & twenty dollars 25 cents, which I pay over to John G. Stetson, clerk of the court aforesaid, to be disposed of as the court directs.

Attest: GEO. L. ANDREWS, *Marshal.*

35 This cause was thence continued from term to term to this present term, when, to wit, October 15th, 1869, it was ordered, adjudged, and decreed by the court that the judgment and decree of the district court in this cause be, and the same is hereby, affirmed, with costs, and that the said United States, defendants in error, recover against the said Joseph A. Boyden, plaintiff in error, nineteen dollars and ninety cents for their costs herein expended.

A true record.

Attest: JOHN G. STETSON, *Clerk.*

36 UNITED STATES OF AMERICA,
District of Massachusetts, ss:

I, John G. Stetson, clerk of the circuit court of the United States within and for the first circuit and district of Massachusetts, hereby certify that the foregoing is a true copy of the record and of all proceedings in said cause in said circuit court determined.

In testimony whereof I hereunto subscribe my name and affix the seal of said court this twentieth day of November, A. D. 1869.

[SEAL.] JOHN G. STETSON, *Clerk.*

37 *Bond on writ of error.*

Know all men by these presents that we, Joseph A. Boyden, of Boston, in the district of Massachusetts, as principal, and Eben Boyden, of Billerica, Inslee G. Jones, of Medford, and Benjamin F. Young, of Somerville, all in said district, as sureties, are held and firmly bound unto the United States of America in the full and just sum of nine thousand three hundred and thirty-one dollars, to be paid to the United States of America, their successors, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents, sealed with our seals, and dated the twelfth day of September, in the year of our Lord one thousand eight hundred and sixty-eight.

Whereas lately, at a district court of the United States for the district of Massachusetts, in a suit depending in said court, entitled "The United States, by information, versus 278 Barrels of Distilled Spirits—Joseph A. Boyden, claimant of 154 barrels, John H. Harrington, under the name of Boyden and Company, claimant of the remaining 124 barrels," judgment was rendered against the said Joseph A. Boyden, and the said Joseph A. Boyden having procured a writ of error, and filed a copy thereof in the clerk's office of said court to reverse the judgment in the aforesaid suit, and a citation directed to the said United States of America, citing and admonishing them to be and appear at a circuit court of the United States, to be holden at Boston, in said district of Massachusetts, on the fifteenth day of October next:

Now, the condition of the above obligation is such, that if the said Joseph A. Boyden shall prosecute his said writ of error to effect, and answer all damages and costs if he fail to make his plea good, then the above obligation to be null and void; otherwise to remain in full force and virtue.

JOSEPH A. BOYDEN. [L. S.]
EBEN BOYDEN. [L. S.]
INSLEY G. JONES. [L. S.]
BENJ. F. YOUNG. [L. S.]

Signed, sealed, and delivered in presence of—
ALBERT R. RICHARDSON, *to E. B.*
ISAAC M. CHEETWICK, *to B. F. Y.*
J. H. HARRINGTON, *to I. G. J.*
SYLVESTER HARRINGTON, *to J. A. B.*

Approved:

JOHN LOWELL, *Judge.*

A true copy of the bond taken by the judge at the time of allowing

the writ of error named in said bond, which bond is on file in the office of the clerk of the circuit court of the United States for the first circuit and district of Massachusetts.

Attest:

JOHN G. STETSON,
Clerk U. S. C. C. Mass. Dist.

38

39 *Bond on writ of error.*

Know all men by these presents that we, Joseph A. Boyden, of Boston, in the district of Massachusetts, as principal, and Lemuel M. Brock, of Medford, in said district, as surety, are held and firmly bound unto the United States of America in the full and just sum of five hundred dollars, to be paid to the said United States of America, their successors, or assigns; to which payment, well and truly to be made, we bind ourourselves, our heirs, executors, and administrators, jointly and severally, by these presents, sealed with our seals, and dated the fifteenth day of October, in the year of our Lord one thousand eight hundred and sixty-nine.

Whereas lately, at a circuit court of the United States within and for the district of Massachusetts, in a suit depending in said court, entitled "278 Barrels Distilled Spirits—Joseph A. Boyden, claimant of 154 barrels, plaintiff in error, v. The United States," judgment was rendered against the said Joseph A. Boyden, and the said Joseph A. Boyden having procured a writ of error, and filed a copy thereof in the clerk's office of the said court, to reverse the judgment in the aforesaid suit, and a citation directed to the said United States of America, citing and admonishing them to be and appear at Supreme Court of the United States, to be holden at Washington on the first Monday of December next:

Now, the condition of the above obligation is such, that if the said Joseph A. Boyden shall prosecute his said writ of error to effect, and answer all damages and costs if he fail to make his plea good, then the above obligation to be null and void; otherwise to remain in full force and virtue.

J. A. BOYDEN. [L. S.]
L. M. BROCK. [L. S.]

Signed, sealed, and delivered in presence of—
JOHN G. STETSON.

Approved:

NATHAN CLIFFORD,
Associate Jus. Sup. Court of the U. S.

Approved 19 October, 1869.

JOHN C. ROPES, *Ass't U. S. Att'y.*

A true copy of the bond taken by the judge at the time of allowing the writ of error named in said bond, which bond is on file in the office of the clerk of the circuit court of the United States for the first circuit and district of Massachusetts.

Attest:

JOHN G. STETSON,
Clerk U. S. C. C. Mass. Dist.

40

41 THE UNITED STATES OF AMERICA:

To the United States of America, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the first Monday of December next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States, district of Massachusetts, wherein Joseph A. Boyden, claimant of 154 barrels distilled spirits, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Nathan Clifford, associate justice of the Supreme Court of the United States, this 20th day of October, in the year of our Lord one thousand eight hundred and sixty-nine.

NATHAN CLIFFORD,
Associate Jus. Sup. Court of the U. S.

Due, sufficient, & legal service of the foregoing citation is acknowledged in behalf of the United States.

JOHN C. ROPES,
Ass't U. S. Att'y.

(Indorsement on cover:) No. 324. Joseph A. Boyden, claimant of 154 barrels of distilled spirits, plaintiff in error, vs. The United States. Massachusetts C. C. U. S.
Filed 6th December, 1869.

Supreme Court of the United States

December Term, 1870.

No.

JOHN H. HARRINGTON, *Claimant of* 124 *barrels of Distilled Spirits, Plaintiff in Error,*

vs.

THE UNITED STATES.

No.

JOSEPH A. BOYDEN, *Claimant of* 154 *Barrels Distilled Spirits, Plaintiff in Error,*

vs.

THE UNITED STATES.

In Error to the Circuit Court of the United States for the District of Massachusetts.

BRIEF OF PLAINTIFFS IN ERROR.

Supreme Court of the United States.

December Term, 1870.

No. _____

JOHN H. HARRINGTON, *Claimant of* 124 *barrels of Distilled Spirits, Plaintiff in Error,*

vs.

THE UNITED STATES.

No. _____

JOSEPH A. BOYDEN, *Claimant of* 154 *Barrels Distilled Spirits, Plaintiff in Error,*

vs.

THE UNITED STATES.

In Error to the Circuit Court of the United States for the District of Massachusetts.

BRIEF OF PLAINTIFFS IN ERROR.

At the District Court for the District of Massachusetts, held on the fifteenth day of May, 1867, the attorney for the United States filed an information, alleging that on the twenty-seventh day of April, previous, a collector of internal revenue had seized at Boston 278 barrels of distilled spirits, and praying that the same might be condemned for the use of the United States for the causes set forth in five several counts. Subsequently, the claimant Harrington appeared, claiming 124 barrels of said spirits, and the claimant Boyden appeared claiming 154 barrels of said spirits, and severally pleaded that none of the goods had become forfeited as alleged in said information, and that the allegations therein were not true.

Issue was joined upon each of these pleas. At the trial in July, 1868, the verdict of the jury in the matter of Boyden's claim was in favor of the United States; in the matter of Harrington's claim, the verdict was in favor of Harrington for 74 barrels, and in favor of the United States for the remaining 50 barrels. A bill of exceptions to several of the rulings and refusals to rule of the presiding judge was allowed by the presiding judge, and the same came before the Circuit Court for argument at the October term, 1868. At the October term, 1869, the Circuit Court affirmed the judgment of the District Court, and the cause now comes before this Court on writs of error.

The information originally contained five counts, but the fourth and fifth counts were withdrawn before trial, and the cause proceeded to trial on the remaining counts.

The *first* count is founded on § 45 of the act of July 13, 1866, 14 Stat. at large, p. 163, and alleges that the spirits were found elsewhere than in a bonded warehouse, not having been removed therefrom according to law, and the taxes not having been paid.

The *second* count is founded on § 48 of the act of June 30, 1864, as amended by act of July 13, 1866, 14 Stat. at large, p. 162, and alleges that the spirits were in the possession of Harrington, for the purpose of being sold in fraud of the internal revenue laws, and with design to avoid the payment of taxes.

The *third* count is founded on the same section and is

identical in terms with the second count, except that it alleges that the spirits were in the possession of Boyden.

I.

The question raised by the refusal of the presiding judge to give the *first* and *second* instructions prayed for by the claimants, is, whether upon the facts conceded by the government, the latter were entitled to a forfeiture *under either of the sections of the statute under which the information was framed.*

It appeared that the spirits had been removed from United States bonded warehouses upon application in due form to the collector of the district, for transportation to Eastport, Maine, for exportation, thence, and upon the acceptance of the bonds offered therefor, as provided by § 40 of the act of July 13, 1866.

It also appeared that the spirits were not in fact transported to Eastport, but were sold in Boston, and that the bonds offered proved to be false and fraudulent. By reference to § 42 of the same statute, it will be seen that a penalty is therein imposed on persons executing such bonds, or conniving at the execution thereof, and a forfeiture of all spirits to which such bonds relate, provided for.

The position of the claimants is, that upon the facts conceded by the government, *the forfeiture could be had only under* § 42, *on which, however, no count in the information is founded.*

It will be noticed that the act of June 30, 1864, contained no specific provisions for the forfeiture of distilled spirits. Under that act, therefore, all proceedings for forfeiture of spirits must have been brought under § 48. But the act

of July 13, 1866, provides in §§ 40 to 45, inclusive, for all cases where the government would be entitled to a forfeiture of spirits.

Hence, to give proper effect to these sections, which else would be meaningless, it must be assumed that § 48 of the act of 1864, as amended by the act of 1866, was intended to apply not to all goods, but to all goods except those for which specific provision was made in the subsequent sections.

If this view is correct, then the counts under § 48 of the act of 1864, as amended, cannot be maintained.

We come to consider, then, the various provisions of §§ 40 to 45, of the act of 1866, in relation to distilled spirits, under which alone it is submitted, proceedings for the forfeiture of distilled spirits can be maintained. And there it will be seen that Congress has provided for every case in which a forfeiture of distilled spirits might be claimed.

1. If the goods are removed from the bonded warehouse for exportation, transportation, transportation for exportation, rectification, or redistillation, according to the forms prescribed by §§ 40 and 41, without the payment of the tax, but upon the giving of a satisfactory bond, there is no obligation on the party withdrawing to export, transport, redistil or rectify the goods as originally proposed; but if he does not do so, the government holds the sureties on the bond for the payment of the taxes.

2. If, however, the bonds were false and fraudulent, and the proceeding, though conducted according to the forms of law, was for the purpose of defrauding the government out

of the payment of the tax, then, under § 40, the party withdrawing is liable to a penalty, *and the spirits to forfeiture.*

3. If the spirits are not removed from the bonded warehouse, in accordance with the forms provided by §§ 40 and 41, then they are liable to forfeiture under § 45.

The claimants contend that the forfeiture provided for in § 45, applies to spirits to which the provisions of § 42 do not apply.

The construction contended for by the claimants gives proper effect, it is submitted, to each section of the act of 1866, and a clear and intelligible meaning to the statute, whereas, if the construction contended for by the government be correct, and § 48 of the act of 1864, as amended, and § 45 of the act of 1866 can be held to apply to the facts of this case, it is impossible to see what is the meaning, or what would be the application of § 42; for no case of forfeiture could then arise under § 42, which would not be covered by § 45 and by § 48 of the act of 1864 as amended.

It will not be assumed that Congress intended to provide in different sections, and by different forms of language, penalties and forfeitures for the same offence. Nor will it be assumed that because in some cases they may have used general terms without express words of qualification, they did not intend to qualify them so far as they cover cases for which more detailed and specific provision is made. The statute should be so construed that every section will have its full force and meaning.

The learned judge who delivered the opinion in the Circuit Court, does not allude to § 42, in his opinion, and decided the questions raised by the claimants' prayer, as if the claimants contended that spirits withdrawn from gov-

ernment warehouses fraudulently, but according to the forms of law, were not liable to forfeiture. He misunderstood the position of the claimants. Their argument on this point related solely to the form of the pleadings, and was that the information should have been laid under § 42.

II.

The *third* and *fourth* prayers for instructions, presented by claimants, relate to the issues of fact submitted to the jury.

The questions of fact in controversy were,

First. Whether the claimants, or either of them, were parties to the fraudulent withdrawal of the spirits from the warehouses.

Second. Whether they were cognizant of it.

Third. Whether the spirits seized were a part of the spirits fraudulently withdrawn.

Fourth. Whether they had been mixed with other liquors and then rectified, and

Fifth. Whether such mixture, if made, was innocently or fraudulently made.

The learned judge, who gave the opinion in the Circuit Court, states in his opinion, that the verdict of the jury was in favor of the United States, which, as appears by the record, is incorrect in relation to Harrington's claim. Further he says, "all necessity for any discussion in regard to the facts of the case, is removed by the verdict of the jury, which shows that the theory of fact assumed by the United States is correct, that the spirits described in the informa

tion were parcel of the spirits previously withdrawn from the bonded warehouse by means of the false and fraudulent bonds, and *that the claimants were parties to the conspiracy*, by which the same were so withdrawn without the payment of the taxes, to which they were subject under the internal revenue laws."

10 Int. Rev. Record, p. 164.

It is respectfully submitted that the above is an incorrect inference from the bill of exceptions.

If the instructions given by the presiding judge in the District Court be referred to (Record, printed page 13), it will be seen that the jury were instructed, in effect, that the government was entitled to forfeiture, if the claimants bought the spirits *with knowledge that the spirits had been illegally removed from the warehouse*, or if Harrington bought them, without knowledge on his part, but through Boyden, as his agent, and the latter had knowledge, and although the spirits had been mixed with other spirits, so that they could not be identified and distinguished.

The fair inference from the verdicts, taken in connection with these instructions (and the claimants are clearly entitled to the most favorable construction that can be put upon the language of the bill of exceptions), is, that the jury found that Boyden was cognizant of the fraud, but not that he was a party to it, and that Harrington had no knowledge of the same; and that some part, if not the whole, of the spirits seized could not be identified with the spirits originally withdrawn from the warehouses in violation of law.

III.

We consider first the *third* prayer for instruction, which had relation only to the claim of Harrington. The prayer was in effect, so far as the point to be considered is concerned, that if the claimant bought the goods without knowledge of the fact that the bonds were worthless, or that the spirits had been removed from the warehouse with intent to defraud the government, the same are not liable to forfeiture. The Court gave this instruction, but with the qualification that if Boyden bought the spirits as agent for Harrington, and Boyden was cognizant of the fraud, Harrington would be bound by his knowledge, and the claimant Harrington's exception is to the giving of this qualification.

It will be observed that both the District Court in its charge to the jury, and the Circuit Court in the opinion above referred to, adopted this view of the claimants, that the spirits were not liable to forfeiture, if bought without knowledge of the fraud, and that no exception was taken by the United States to that ruling in the District Court. It must be assumed, therefore, that the correctness of that ruling is not open to question here.

The only question to be considered is, whether the knowledge of the agent at any time obtained and not communicated to the principal, is to be held to be the knowledge of the principal so as to subject to forfeiture under a severe penal statute, merchandise liable to forfeiture by the terms of the act itself, only when the principal has knowledge of the fraud.

It does not appear from the bill of exceptions whether Boyden acquired knowledge of the fraud before or after he was employed by Harrington as his agent; but as stated in the opinion of the learned judge in the Circuit Court, "it must be assumed that it was before he was so employed, as the instruction, as given, is broad enough to include both theories."

There is some conflict in the authorities upon this point; but it is submitted that the weight of authority establishes the rule to be, that the principal is not affected by the knowledge of the agent, unless the knowledge is acquired by the agent while in the employ of the principal and in the course of the very transaction in which he is employed.

This doctrine was laid down in 1729 in *Fitzgerald* vs. *Fauconberg*, *Fitzgibbon*, 211.

In *Lowther* vs. *Carlton*, 2 *Atk.* 242, Lord Ch. Hardwicke said, "If a counsel or attorney is employed to look over a title, and if by some other transaction, foreign to the business in hand, has notice, this shall not affect the purchaser."

The doctrine was re-affirmed by the same judge in *Warwich* vs. *Warwich*, 3 Atk. 294, and in *Worsley* vs. *Earl of Scarborough*, ib. 392, by Lord Erskine in *Hiern* vs. *Mill*, 13 Vesey, Jr., 120, and by Lord Eldon in *Mountford* vs. *Scott*, 3 Mad. 34.

In *Kennedy* vs *Green*, 3 Mylne & K. 693, Lord Brougham held that a client was not to be held cognizant of a fraud, *although his solicitor was the contriver and actor in the same*, because the solicitor's knowledge was not obtained in the course of his employment for that client.

See also *Wilde vs. Gibson*, 1 H. of L. Cas. 605.

In the United States, the weight of authority is in support of the same doctrine.

Farmers and Citizens Bank *vs.* Payne, 25 Conn. 444.
Bank of U. S. *vs.* Davis, 2 Hill, 452.
N. Y. Central Ins. Co. *vs.* Nat'l Prot. Ins. Co. 20 Barb. 468.
Brown *vs.* Montgomery, 6 Smith, N. Y. 287.
Jackson *vs.* Sharp, 9 Johns, 163.
Hood *vs.* Fahnestock, 8 Watts, 489.
Brachen *vs.* Miller, 4 Watts & Serg. 111.
Winchester *vs.* Balt. R. R. Co. 4 Md. 231.
U. S. Ins. Co. *vs.* Skinner, 3 Md. Ch. 381.
Willis *vs.* Vallette, 4 Metc. 186.
Keenan *vs.* Missouri Ins. Co. 12 Iowa, 186.
Bierce *vs.* Red Bluff Hotel, 31 Cal. 160.

In England, however, it has been held that when one transaction is clearly followed by, and connected with another; or *when it is clear* that a previous transaction is present to the mind of the agent when engaged in another transaction, there is no ground for the distinction by which the rule that notice to the agent is notice to the principal, had been restricted to the same transaction.

Hargreaves *vs.* Rothwell, 1 Keen. 158.
Lenehan *vs.* McCabe, 2 Ir. Eq. 342.
Fuller *vs.* Bennett, 2 Hare 394.
Dresser *vs.* Norwood, 17 C. B. N. S. 466.

But this relaxation of the rule has not generally obtained in the United States. The Courts of Vermont, New Hampshire, South Carolina, Alabama and Illinois are the only ones that have supported it; and in none of the decisions of these states does it appear that the American authorities were examined.

But in the case of *Hart vs. Farmers' and Mechanics' Bank*, 33 Vt. 252, the Chief Justice says that there is no great doubt in his mind, from the evidence, that the agent did in fact communicate the knowledge to the principal, a fact which would render unnecessary a decision on the point in question. And in the later case of *Blumenthal* vs. *Brainerd*, 38 Vt. 402, the same court appears to have reaffirmed the original doctrine in its entire strictness.

It must therefore be concluded that the weight of authority in the United States, is in support of the rule as laid down originally by the English courts.

And it is submitted that upon reason this rule is correct. It is precisely in accord with the fundamental theories of the relations of principal and agent. Whereas, to make the principal constructively informed of whatever his agent may at any time have known, is inconsistent with those theories, and calculated to work great hardship to innocent parties.

In ordinary cases of agency the principal has no control over the agent except in regard to the very transaction for which he employs him. He cannot compel him to disclose information which he has acquired in the service of others. And if the agent has been himself a participant in a fraud, or has been cognizant of it, he will have the strongest motives to conceal from his new employer all the information which he has acquired in his previous employment.

Indeed, the necessities of business, professional honor, and well established legal principles, will in many cases require the agent to keep to himself prior information. ney, in the course of one employment is info client of a fraud in which his client participat communicate that information to a subsequent purchaser without a breach of professional honor, and ordinarily he will

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Indeed, the necessities of business, professional honor, and well established legal principles, will in many cases require the agent to keep to himself prior information. If an attorney, in the course of one employment is informed by his client of a fraud in which his client participated, he cannot communicate that information to a subsequent purchaser without a breach of professional honor, and ordinarily he will

not do it. So a broker employed in a business transaction is informed of certain facts, yet his success in business, as he views it, will ordinarily prevent his communicating his information to his next employer. A servant is witness to the fraud of his master, or may be himself a participant in it; but shame, fear of discovery, a thousand considerations, will lead him to preserve silence to his next master, though the latter's interest may be seriously affected thereby. And it will readily be seen that the greater the fraud of which the agent is cognizant, and the more actively he participates in it, the stronger inducement he will have not to disclose it to his new employer. The injustice and hardship of the rule which holds the principal, as matter of law, to have knowledge, because his agent, at some time prior to his employment, had the knowledge, is seen in this, that it creates a presumption by law that the agent will communicate information in opposition to the general experience of mankind, that he will not communicate it.

A true and satisfactory rule would seem to be this: The principal must be shown to have knowledge of the fraud. This knowledge is to be proved, as any other question of fact, to the reasonable satisfaction of the jury. It may be shown by evidence of direct communication to him, or by such proof from circumstances, including therein the fact of his employment as an agent of a person who had the knowledge prior to such employment, as that a jury may reasonably infer that the principal had the knowledge, to which of course it is to be added that the same knowlege communicated to his agent while in the course of his employment is to be regarded as communicated to him. In a word, whether a person had knowledge of certain facts is purely a question of fact to be determined ~~proved~~ by a jury under proper instructions, and it should not be laid down as a conclusive presumption of law that

he had, because his agent, before he became his agent, had it.

If these views are sound, then the instruction of the presiding judge in the District Court was incorrect.

But even if the Court should adopt the modification of the rule as stated in *Hargreaves* v. *Rothwell*, and *Dresser* v. *Norwood*, and approved by the learned judge in the Circuit Court, yet the instruction of the learned district judge was clearly wrong, as he failed to give the qualification which is held in those cases to be essential to affect the principal with the prior knowledge of his agent, to wit: that it must appear *that the previous transaction is present to the mind of the agent when engaged in another transaction, or that one transaction is clearly followed by and connected with another so that that fact may necessarily be inferred.*

The learned judge in the Circuit Court inferred from the bill of exceptions that this qualification was given, and states (10 Int. Rev. Rec. 165), that "by the instruction in this case the jury were told that if the agent was cognizant of the fraud *at the time of the purchase* the principal was bound by that knowledge."

But by reference to the bill of exceptions (Record, printed page 13), it will be seen that the instruction in fact, was, "that if Boyden bought the spirits as agent for Harrington, and Boyden was cognizant of the fraud, [when? at any time?] Harrington would be bound by his knowledge."

Surely, the natural inference which a jury would draw from this language, would be that Harrington would be

bound by Boyden's knowledge, *whenever* the same was acquired.

There is nothing in the bill of exceptions to show at what time Boyden became cognizant of the fraud, nor when Harrington employed him to buy goods, nor what interval of time elapsed between the two acts, nor what were the circumstances under which he employed him; nor can any inference be drawn that the information to Boyden and his acts as Harrington's agent were closely related in time. But it is to be inferred that Harrington himself had been guilty of no fraud, and cognizant of no fraud; and if his property is liable to forfeiture by reason of the knowledge of a fraud which his agent had obtained, prior to his employment, he yet respectfully submits that the question should be distinctly submitted to the jury, whether at the time that Boyden acted for him, he had in his mind the fraud of which he had become informed. The language of the presiding judge used at the trial should be considered, as it would naturally be understood by the jury, and so considered it cannot be held to have stated in distinct terms, the qualification to the general rule.

IV.

The fourth instruction prayed for applies to the case of both claimants.

The prayer was as follows: "That if a portion of the spirits proved in this case not to have paid a tax, had passed through the rectifiers in which there were other spirits, and so become mixed with them, no portion of the spirits when rectified would be liable to forfeiture."

(See printed record, p. 13).

The Court declined to give this instruction, and instructed the jury, "that if the rectified spirits came from vats and rectifiers in which the spirits so fraudulently withdrawn, or any portion, were mixed with other lots of similar spirits of the claimant's, so that they could not be distinguished, the government were entitled to the forfeiture of a fair proportion of these spirits, although the mixture might have been innocently made, provided the jury were satisfied of such facts as would, under the instructions of the Court, forfeit the spirits so fraudulently withdrawn, if they had not been so mixed; and if the jury were satisfied of such facts, and also found that the spirits so fraudulently withdrawn, were mixed with other similar spirits of the claimants by them fraudulently, with knowledge of the fraud committed, for the purpose of destroying the identity of the spirits and defrauding the government, and were so mixed that they could not be distinguished and identified, that the entire quantity of this mixture seized was forfeited to the United States." (See printed record, p. 13.)

The learned judge in the Circuit Court assumed (see p. 166, 10 Int. Rev. Record) that the species of the spirits was not changed, but that simply their impurities had been removed.

But it is to be observed that both the prayer for instructions, and the instruction of the presiding judge in the District Court assumed that the spirits were *mixed with other spirits in the rectifiers, so that they could not be distinguished.*

The claimants may concede, for the purpose of the argument, that if spirits otherwise liable to forfeiture, had merely passed through rectifiers without mixture with other spirits, they would still be liable to forfeiture, for they

would remain the same spirits. Their identity would not be lost. They could still be distinguished. But the point is, that where their identity is lost, the government are not entitled to a forfeiture of some other species of goods made up of a mixture of the offending spirits with others.

The statute under which this information is brought, decrees the forfeiture of such spirits, and such spirits only, as have not paid the tax. It is true that there is a provision in section 45, by which "all personal property whatever in the place or building, or within any yard or enclosure where such articles or raw material shall be found," is also liable to forfeiture, which may have been intended by Congress to cover such a case as the present. *But as no count is based upon this provision*, it is unnecessary further to consider it here, except so far as it strengthens the claimants' argument that a new species produced by the mixture of spirits is not liable to forfeiture under an act decreeing forfeiture against one of the original ingredients.

It is important to bear constantly in mind that the prayer and instruction contemplated a loss of identity of the original offending spirits, and then it is contended that neither the new species, nor any part of it, is liable to forfeiture; and this whether the mixture was innocently made, or for the purpose of destroying the identity.

The presiding judge in the District Court laid down two rules to the jury.

1. That if the spirits were mixed with other spirits, with knowledge of the fraud committed, for the purpose of destroying their identity, and were so mixed that they could

not be distinguished and identified, then the entire quantity was forfeited to the United States.

2. That if the mixture was innocently made, the government were entitled to a "fair proportion" of the mixture.

Both of these rules, it is submitted, were incorrect.

There is no more odious system of penalties than the forfeiture of property, even when the express terms of the statute compel it; and yet here, it is proposed to go beyond the language of the statute, and forfeit property which has in no way offended against the law.

That the party making such a mixture ought to be punished, that in fact he may be liable to punishment, or that his other property may be liable to forfeiture under this very statute, *or that in an action at law brought by the government against him, applying the doctrine of confusion of goods, he might be liable,* is entirely immaterial here. The point is, when an information alleges that certain spirits therein named have not paid a tax and are liable to forfeiture, and the evidence shows that the spirits seized are a mixture in which are some of the spirits that did not pay a tax, and others that did pay a tax, the whole forming a new species in which the identity of the non-tax-paying spirits cannot be distinguished, under what provision of the statute on which this information is founded can the forfeiture of any part of the new species be decreed?

The above argument applies to both rules as laid down by the presiding judge in the District Court. But there is the further objection to the second rule that even if the gen-

eral position of the learned judge was correct, he did not give the jury any sufficient instruction as to what constituted the "fair proportion" to the forfeiture of which, in the case of an innocent complainant, the government would be entitled.

On what basis were the jury to estimate the "fair proportion"? Were they to regard merely the relative quantities of the tax-paying and non-tax-paying liquors mixed, and say that a "fair proportion" meant the same number of gallons as had not paid the tax? Or were they to regard the different cost prices of the liquors mixed? Or were they to consider the market value of the mixture when made and rectified, compared with the value of the original non-tax-paying spirits? Were they to take into account the cost of rectifying or not? Or were they to regard all of these circumstances? There is absolutely nothing in the charge to instruct the jury at all on the basis on which they were to estimate the "fair proportion" to which the government was entitled. They were left to estimate in such way as seemed proper to them. And it is submitted that even assuming the correctness of the general proposition of the Court, there was still a want of definiteness and exactness in the instruction.

The claimants contend that the doctrine of confusion of goods as stated either in the civil or the common law, has no application in a proceeding for forfeiture under a criminal statute; and it is believed that there is no one of the numerous cases in the books where that doctrine has been so applied.

"Penal statutes are to be construed strictly, and cases within the like mischief are not to be drawn within a clause

inclosing a prohibition or a forfeiture, unless the words clearly comprehend the case."

Story, J., in the schr. Harriet, 1 Story, 255.

"Penal statutes are to be construed strictly. . . . It is highly proper that it should be a fundamental rule, that no man shall incur a penalty, unless the act which subjects him to it is clearly both within the letter and the spirit of the statute imposing the penalty. . . . It would be an extremely dangerous and unjust rule to carry the principle that what is within the mischief of a statute is within its provisions, so far as to punish a crime not enumerated within the statute, because it was of equal atrocity, or of a kindred character with those named in the act."

E. F. Smith, Com. on Stat. and Const. Law, sects. 723–5.

See also Dwarris on Stats. 635–637, and the following cases there cited.

Warne *vs.* Varley, 6 T. R. 443.
R. *vs.* Handy, 6 T. R. 226.
Martin *vs.* Ford, 5 T. R. 101.

If the statute decreed the forfeiture of molasses, would the government be entitled to a forfeiture of the rum into which it had been made, though by a person intending thus to evade the provisions of the law? If it decreed the forfeiture of flour, would the government be entitled to a forfeiture of the bread made from it?

So when the law provides that spirits *that have not paid a tax*, shall, under certain conditions, be liable to forfeiture,

how does that entitle the government to the forfeiture of certain other spirits, part of which have paid the tax, and which are so mixed into the offending species as that the identity of the non-tax-paying spirits has been destroyed as effectually as if they had been burned up?

The difficulty with the argument for the government on this point is, that it seeks to extend the provisions of the statute to other goods than those in terms described. It alleges that certain spirits, describing them in the information, have not paid the tax, and are liable to forfeiture. The evidence offered in support of this charge is, that the spirits seized are not the same as those described in the information. It then seeks to condemn the spirits seized, not because they are liable to forfeiture by the terms of the act, but because some of their original ingredients, where identity is lost, were so liable. The case may be within the mischief of the statute, but is clearly not covered by its terms, at least not by the terms of the section under which this information is drawn.

From another point of view it will be seen that the doctrine of confusion cannot be applied to this case.

The statute authorizes the government, in case of non payment of the taxes, *either* to proceed against them for forfeiture, *or* to sell them for non-payment of the taxes and apply the proceeds of the sale to the payment of the taxes; and in the present case, by reference to the information (Record, printed pp. 4, 5), it will be seen that in the first three counts the government seeks the forfeiture of the spirits, and in the last count (which was subsequently discontinued) it prays that the amount of taxes due on the spirits be determined,

and the said taxes be declared a lien on the spirits, and the spirits sold for the payment of the same; and the concluding prayer of the information is, in the same way, in the alternative. The government has its election whether to treat the spirits as forfeited, or to treat them as still the property of the owners.

Now, it is conceded that the doctrine is well established, that when goods a reliable to forfeiture under a statute giving no other remedy to the government, the title of the government vests when the offence subjecting them to forfeiture is committed.

But where they are liable to forfeiture *or not*, at the option of the government, no title can vest till that option has been exercised. In this case it was not done till after the information was filed. Therefore, at the time the mixture was made the government had no title to any part of the spirits; the claimants mixed different spirits, all of which belonged to them, and there is no room for the application of the doctrine of confusion, which assumes that at the time of the mixture, part of the ingredients belonged to one person and part to another.

If the title of the government vested when the offence was committed, *the government may assess a tax on its own property and distrain it.*

See Caldwell *vs.* U. S. 8 Howard, 366.

R. M. MORSE, JR.,
Counsel for Claimants.

In the Supreme Court of the United States.

DECEMBER TERM, 1870.

J. H. HARRINGTON, *Plaintiff in Error*,
vs.
THE UNITED STATES. } No. 124.

JOSEPH A. BOYDEN, *Plaintiff in Error*,
vs.
THE UNITED STATES. } No. 125.

Writs of Error to the Circuit Court of the United States for the District of Massachusetts.

BRIEF FOR THE UNITED STATES.

In the Supreme Court of the United States.

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Writs of Error to the Circuit Court of the United States for the District of Massachusetts.

BRIEF FOR THE UNITED STATES.

STATEMENT OF CASE.

This was an information filed by the United States District Attorney against two hundred and seventy-eight barrels of distilled spirits. Harrington, under the name of Boyden & Co., appeared as claimant of one hundred and twenty-four barrels, and Boyden as claimant of one hundred and fifty-four barrels. The information contained five counts, of which, however, only the first three were relied upon at the trial.

The first count charged that said distilled spirits

were found elsewhere than in a bonded warehouse, in a building then occupied by said Boyden & Co., and said distilled spirits had not been removed from any bonded warehouse according to law, and the tax imposed by law thereon had not been paid.

The second count charged that the said spirits were in the possession and custody of Harrington, then doing business under the name of Boyden & Co, for the purpose of being sold and removed in fraud of the internal revenue laws, and with the design of said Harrington to avoid payment of taxes imposed upon said spirits, the said taxes not having been paid.

The third count charged that the said spirits were found in the possession and custody and within the control of Boyden, in the same building, for the purpose of being sold and removed by said Boyden in fraud of the internal revenue laws, and with the design of Boyden to avoid payment of the taxes imposed as aforesaid upon them, the taxes not having been paid.

At the trial it appeared in evidence that, in April, 1867, several hundred barrels of domestic distilled spirits were withdrawn from United States bonded warehouses in Boston, upon applications made in due form to the collector of the district, for transportation to Eastport, Maine, and for exportation thence, and upon the delivery of bonds which afterwards proved to be false and fraudulent. The spirits were not transported, or attempted to be transported, to Eastport, but were removed for sale to Boston, and the taxes were not paid

on them. They were seized in April, 1867, in a building (No. 49) in India street, in Boston, in the possession of Boyden and Harrington.

It was contended by the United States that the spirits informed against were a portion of the spirits removed upon these false and fraudulent bonds, and that the claimants were parties to the fraud in which the bonds were given, and the spirits obtained; that if any of the spirits seized should be found to be partly made up of the spirits so fraudulently removed, and partly made up of others mixed with them, that the mixing had been fraudulently done by the claimants with a knowledge of the fraud, and for the purpose of destroying the identity of the spirits and defrauding the United States; that Boyden and Harrington were connected in business and associated in this fraud. There was no evidence, except as to sixteen barrels, that any of the barrels of spirits claimed by Boyden were mixed spirits, or had been put in the leaches, or had changed contents since they were put into his possession. It was also contended that all these spirits were, at the time of seizure, found in the possession of said Boyden and Harrington, for the purpose of being removed by said Boyden and Harrington in fraud of the internal revenue laws, and with the design of each of them to avoid paying the internal taxes due thereon.

It was contended by the claimants that part of the spirits in controversy were not a portion of the spirits so fraudulently withdrawn, but that some of them were

different and distinct lots of spirits; that the spirits claimed by Harrington had been rectified in leaches, in which various lots of similar spirits, including possibly some of the spirits so fraudulently withdrawn, had been mixed, so that it was impossible to identify the spirits after rectification with any particular lot originally put into the leaches. The claimants also contended that they had bought the spirits seized in open market, and without knowledge of any fraud. Harrington, in his own behalf, also contended that such spirits as he had bought he bought through and by means of Boyden, as his agent, and without knowledge of any fraud on his part. The claimants requested the court to instruct the jury, among other things, as follows:

"1. That if the distilled spirits which are the subject of controversy had been deposited in a United States bonded warehouse, and had been removed therefrom upon application to the collector of the district in which they were situate, and by his authority, for rectification or transportation for exportation, they are not liable to forfeiture.

"2. That if said spirits had been removed from a United States bonded warehouse upon application to the collector of the district, and upon the furnishing of bonds which were satisfactory to and accepted by him, and upon permission thereupon granted by the collector, and were seized before the expiration of the time allowed for rectification or transportation, the spirits are not liable to forfeiture.

"3. That if said spirits had been removed from a United States bonded warehouse according to the forms of law, viz., upon application made in due form to the collector for leave to withdraw, and upon bonds being

given in the prescribed form, and permission thereupon given in due form for their removal, and said spirits had been bought by the claimants of the party withdrawing or his agents; without knowledge of the fact that the bonds were worthless, or that the said spirits were removed from the warehouse with intent to defraud the Government, they are not liable to forfeiture.

"4. That if a portion of the spirits proved in this case not to have paid a tax had passed through the rectifiers in which there were other spirits, and so become mixed with them, no portion of the spirits, when rectified, would be liable to forfeiture.

"The court decided to give the first and second instructions prayed for.

"The court gave the third instruction prayed for, with this qualification: that if Boyden bought the spirits as agent for Harrington, and Boyden was cognizant of the fraud, Harrington would be bound by his knowledge.

"The court declined to give the fourth instruction prayed for, and instructed the jury that if the rectified spirits came from vats and rectifiers in which the spirits so fraudulently withdrawn, or any portion, were mixed with other lots of similar spirits of the claimants, so that they could not be distinguished, the Government were entitled to the forfeiture of a fair proportion of these spirits, although the mixture might have been innocently made, provided the jury were satisfied of such facts as would, under the instructions of the court, forfeit the spirits so fraudulently withdrawn, if they had not been so mixed; and if the jury were satisfied of such facts, and also found the spirits so fraudulently withdrawn were mixed with other similar spirits of the claimants by them fraudulently, with knowledge of the fraud committed, for the purpose of destroying the identity of the spirits and defrauding the Government, and were so mixed that they could not be distinguished and identified, that the entire quantity of this mixture seized was forfeited to the United States."

The jury found a verdict of forfeiture against the spirits claimed by Boyden, and likewise of forfeiture against the spirits claimed by Harrington, excepting seventy-four barrels.

POINTS AND AUTHORITIES.

I.

Upon the evidence in the case, the spirits were liable to forfeiture, both as being found elsewhere than in a bonded warehouse and not having been removed therefrom according to law and the taxes on the same not having been paid, and also as being in the possession of the claimants for the purpose of being sold in fraud of the internal revenue laws, and with design to avoid the payment of taxes. Such being the case, it is perfectly immaterial that they were likewise liable to forfeiture on account of having been fraudulently obtained from the Government on the pretence of intended exportation.

It is a perfectly familiar and elementary rule of pleading, both civil and criminal, that upon any given statement of facts different forms of action may be brought and different crimes charged. In the case of goods fraudulently obtained from the owner, or tortiously procured, the owner may sue in tort, or he may waive the tort and sue as in contract for their value. So, likewise, in an information or indictment, different counts may be inserted, either charging the same offence

in different ways, or else charging various offences founded upon the same evidence.

Bac. Ab., Actions in General C.; Pleas and Pleadings, B. 3.

1 Archb. Crim. Pl., (7 Am. ed.,) 310 *et seq.*

In the present case the district attorney thought it best to place his claim for forfeiture upon the grounds set forth in the first three counts of the information, and if the evidence produced at the trial sustains those charges, the claimants are not injured by the fact; and it is a matter perfectly immaterial to the present discussion whether he might not likewise have inserted a count and have claimed a forfeiture under other sections of the internal revenue laws which he did not deem it his duty to rely upon. There does not seem to be anything in those provisions of the internal revenue laws cited by the counsel for the plaintiffs in error which restrict the right of the Government to proceed in any given case upon one section of an act rather than upon another, where the evidence would support an information upon either. Violations of them are made separate and distinct offences, but those offences can be charged and coupled together, or election be made between them, in accordance with the ordinary rules of civil and criminal procedure. The plaintiffs in error were in no way injured by the rulings of the judge on these points.

II.

The instructions with regard to the intermixture of the seized spirits with others were sufficiently favorable to the claimants. The law on this subject, as stated by Chancellor Kent, is as follows:

"With respect to the state of a *confusion* of goods, where those of two persons are so intermixed that they can no longer be distinguished, each of them has an equal interest in the subject as tenants in common, if the intermixture was by consent. But if it was wilfully made, without mutual consent, then the civil law gave the whole to him who made the intermixture, and compelled him to make satisfaction in damages to the other party for what he had lost. The common law gave the entire property, without any account, to him whose property was originally invaded and its distinct character destroyed."

2 Kent. Com., (6th ed.,) 364.

Willard *vs.* Rice, 11 Met., 493.

See United States *vs.* Fifty-six Barrels of Whisky, 4 Int. Rev. Rec., 106, 108.

It is undoubtedly true, that if the property changed its character entirely, as in the case of grain made into flour, or flour into bread, the owner cannot claim the new article, but has only an action for damages.

2 Kent. Com., 363, 364.

Colwill *vs.* Reeves, 2 Camp., 575.

But this would not apply to a case where the character of the property is not changed, but its value simply improved. The rectifying of spirits does not make them anything besides spirits, but merely changes their

character. In a suit to recover them there would be no variance in pleading caused by the change which they have undergone. Thus it has been held that making leather into shoes, or cloth into coats, or trees into timber, does not so change the character of the article as to defeat the rights of the owner.

See 2 Kent's Com., *ubi supra*.

The fundamental principle upon which this rule of law is founded, is that a wrong-doer cannot take advantage of his own wrong-doing in order to defeat or affect in any manner the rights of the parties whom he has injured, and, therefore, as long as the property taken is in such a condition that the thing itself which the owner has been deprived of can be restored to him in specie, he is entitled to it with all its accretions in value which may have been acquired by the wrongful act of the tortfeasor.

This rule of law, it is contended, applies equally as well to a process to enforce forfeiture of goods to the United States for violation of provisions of the revenue laws, as to an ordinary action to recover goods of which the owner has been tortiously dispossessed.

The instructions of the court assumed that the spirits did not change their character by the intermixture and rectification, and then the learned judge gave two instructions, (assuming, of course, that in other respects these spirits were liable to forfeiture,) first, that the rights of the Government could not be defeated by this

intermixture, but that they were entitled to a forfeiture of a fair proportion of the spirits with which the forfeited spirits had been intermixed. This would seem to be at least as favorable to the claimants as they could demand. In one sense the identity of the spirits may have been lost, but the nature of the article was such that the intermixture did not prevent what might be considered as an equitable division of the rectified spirits between the different owners. The relation of the parties was treated as that of tenants in common of property which has been intermixed by mutual consent. These principles have recently been applied to the case of grain stored by means of elevators, in which the identity of the several parcels of grain stored by various owners is lost, but they are, in consequence, entitled to an aliquot part of all the grain.

See Cushing *vs.* Breed, 14 Allen, 376.

It may, indeed, be doubted whether, upon the evidence in this case, the claimants could be permitted to set up any innocent intermixture of the spirits with other spirits as a defence to the claim of the United States for forfeiture, because it might be contended that in the law all their actions, from the time they obtained possession of the spirits, must be considered as in their own wrong. But, assuming that if the United States were otherwise entitled to a forfeiture of the spirits which had been fraudulently removed from the bonded warehouses, the claimants were in no way injured by the ruling of the court, as they obtained the value of these spirits, and

would lose only that proportion of the rectified spirits which these spirits against which forfeiture was sought bore to all the spirits in the rectifying vats.

The second part of the instruction on this point was precisely within the rule as laid down by Chancellor Kent, and by Chief Justice Shaw in the leading case of Willard *vs.* Rice, *ubi supra;* that if this intermixture was fraudulently made, for the purpose of destroying the identity of the spirits and defrauding the Government, that is, of preventing the Government, by the intermixture, from being able to enforce its claim against those goods which were legally forfeited, and so mixed that they could not be distinguished and identified, then the entire quantity intermixed was forfeited to the United States.

There can be no question with respect to the correctness of this instruction, except upon the ground that this principle of law has no application to a process for forfeiture, and this seems to be the ground upon which the counsel for the plaintiffs in error rely. The answer to it is a reference to the principle before referred to upon which this rule of law is founded.

This is, undoubtedly, in one sense, a penal statute, but it is not a statute which, therefore, is to be strictly construed—a point too often decided to be now open in this court.

Taylor *vs* The United States, 3 How., 197, 210.

Cliquot's Champagne, 3 Wallace, 114, 145.

The United States *vs.* Hodson, December term, 1870.

The whole proceeding of the claimants, as found under the instructions of the court, were a fraud upon the Government, and the only question is, whether they shall escape the punishment which the law imposes on them, and the rights of the Government be defeated by their fraudulent and criminal acts.

This law must be construed in connection with and as in addition to the common law applying to the same subject-matter, and, where the rights of the Government are liable to be defeated by the fraudulent action of individuals not provided for by the statute, the rules of the common law applicable to such conduct must be considered as applying to the case.

III.

In the case of Harrington, the question arises, how far he is bound by the guilty knowledge of his agent, Boyden, in the purchase of the liquor. This involves a broader question, upon which there is considerable conflict of authority. It is unnecessary here to discuss it in its broader aspects, although the better opinion seems to be that in mercantile transactions and in other cases of the purchase and sale of personal property, the knowledge of the agent is knowledge of the principal.

Smith's Merc. Law, 175, 176.

Dresser *vs.* Norwood, 17 C. B., N. S., 481.

See likewise authorities cited by Mr. Justice Clifford, 10 Int. Rev. Rec., 165.

Those cases which deny that a principal can be held

responsible for knowledge of his agent, are mostly cases of the relations of solicitor and client, and refer to matters of titles to real estate. The question involved therein seems to have been, how far knowledge in the agent of facts which would charge him with a trust in favor of third parties can bind an innocent party

Lother *vs.* Carlton, 2 Atk., 242.

Warwick *vs.* Warwick, 3 Atk., 294.

Mountford *vs.* Scott, 3 Madd., 34.

Hood *vs.* Fahnestock, 8 Watts, 489.

Brachen *vs.* Miller, 4 W. and S., 111.

And the doctrine formerly prevalent in England has been greatly qualified by recent cases.

Hargreaves *vs.* Rothwell, 1 Keen, 158.

Fuller *vs.* Bennett, 2 Hare, 394.

These cases proceed on the principle that the very business of solicitors gives them vast means of information, and that parties employ them understanding this, and, likewise, that they are frequently the agents of both parties in negotiations. They further proceed on the ground that, although an agent may have at one time had knowledge of certain facts, which, if known to his principal, would bind him, and might annul his bargain, yet it may be that he has forgotten them, or that they were not present in his mind at the time of any particular transaction. Thus, if the knowledge was acquired during the existence of the agency, it affects the principal.

Whatever may be the general rule in respect of the

responsibility of a principal for the knowledge of his agent, it must be that where the knowledge of the agent is that of facts which it is his duty to communicate to his principal, then his principal is bound thereby. For example, nobody will pretend that if an agent knew that goods had been stolen, it would not be his duty to imform his principal of this circumstance before he bought the goods for him; and so, if an agent knows that goods have been obtained by fraud or false pretences, it would seem to be equally his duty to inform his principal of those facts before he purchased them. If he does not, counsel contend that his principal is responsible for his action, which is tainted with fraud.

But the question in this case is a very simple one. If Boyden, when he bought these spirits for Harrington, had knowledge that they had been fraudulently obtained possession of, and notwithstanding such knowledge he bought them, he became party to the fraud. It is widely different from a case of errors arising either from forgetfulness or indiscretion, but which were, nevertheless, attended by perfect good faith on all sides. The question is, whether the right of forfeiture of the United States can be defeated by the fact that Harrington may not have been aware of the fraudulent means by which possession of the spirits had been obtained when the agent employed by him to buy them knew this fact, and bought them notwithstanding. The case would thus seem to fall within the principle of Hern *vs.* Nichols, 1 Salk , 289.

There is one other thing, too, which distinguishes the case from many of those cited by the learned counsel for the plaintiffs in error, and that is, that the knowledge in question was knowledge relating to these particular spirits only. It was not that sort of general knowledge which might not have been in the mind of the agent at the time of the purchase, and, therefore might come within the reason assigned for many of the decisions on the other side.

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